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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 516

LENNIE KANE, Administratrix of
the Estate of CHARLES KANE, Deceased,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Missouri En Banc.

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INDEX.

PAGE

Petition for Writ of Certiorari 1

Jurisdiction 7

Statutes Involved 7, 22-23

Record Evidence shows how respondent was guilty of negligence Exhibits 1, 2, 3, 4 2

4 Reasons why Writ should be granted 8

Statement contains 7 specifications of error 11

A. The record in this case contains sufficient facts warranting submission to a jury. There were at least 10 facts, constituting acts of negligence, on the part of respondent, which contributed to the death of petitioner's deceased husband 2-3

B. Sec. 51 of the Federal Employers' Liability Act is plain and clear. It provides for damages for every one suffering any injury while employed at post of duty by an interstate carrier. Sec. 53 of said Act provides that contributory negligence does not bar recovery • • • . Sec. 54 of said Act abolishes defense of assumption of risk due to negligence 23-24

Appendix 23

CASES CITED.

Bailey, Admx. v. Central Vermont Ry., Inc., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 ..... 13, 15

Eglaser v. Scandritt et. al., 151 Fed. 2d. 562, l. c. 566 (7 Cir. 1945) 13, 20

Lavender, Adm. v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 ..... 13, 17

Lilly v. Grand Trunk Western Ry. Co., 317 U.S. 481, 486, 87 L. Ed. 411, 415 14

Louisiana Nav. Co. v. Oyster Commissioners of Louisiana, 226 U.S. 99, 33 S. Ct. 78 17

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520 ..... 13, 14

Urie v. Thompson, Trustee, 377 U.S. 163, 180, 69 S. Ct. 1018, 83 L. Ed. 403 ..... 13, 19

7th. Amendment to the Constitution of the United States 7, 22

14th. Amendment to the Constitution of the United States 7, 22

Federal Employers' Liability Act of April 22, 1908 .... 7, 22

Amended August 11, 1939 (45 U.S.C.A. Chap. 2, Sections 51, 53, 54) 2, 3, 12, 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No.

LENNIE KANE, Administratrix of
the Estate of CHARLES KANE, Deceased,
Petitioner,

VS.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Missouri En Banc.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

(Figures in parentheses refer to pages in transcript of record)

Your Petitioner, Lennie Kane, Administratrix of the Estate of her deceased husband, Charles Kane, respectfully shows this Honorable Court:

1. That the matter in controversy herein, exceeds, exclusive of interest and costs, the sum or value of

$3,000.00: that in her suit, she asks $50,000.00 damages for the death of her husband; also, that herein a Federal Question is involved; - because, the Supreme Court of Missouri has ignored the Constitution and laws of the United States.

2. That your petitioner is a Citizen of the United States; that she duly filed suit in the Circuit Court of Jackson County, Missouri, under and by virtue of the FEDERAL EMPLOYERS' LIABILITY ACT, 45 U.S.C.A. Secs. 51, 53, 54, asking damages in the sum of $50,000.00, for the negligent death of her husband Charles Kane, deceased, who for 24 years was an employee of respondent, - a common carrier by Railroad, engaged in Interstate Commerce, or commerce between States such as Illinois, Missouri, Nebraska, Colorado, at the time of the accident, which later caused the death of said employee Kane; that petitioner's rights, privileges and immunities were invaded and violated at the time the Trial Court denied her a **Trial by Jury**, on the false grounds of "**Want of Evidence,**" (332) all in the face of the fact the record evidence did show how respondent was guilty of negligence, in the following manner, to-wit:

1. Not furnishing deceased employee a safe place to work, only about two or three feet between a hot stove, sink and work-table; (Exs. 1, 2, 3, 4); (63); no window in kitchen in dining-car to look out-side, or for ventilation, (Exs. 1, 2, 3, 4); (63-190);

2. No hand-holds for safety or protection; (Exs. 1, 2, 3, 4); (63-190); (12);

3. Crowded and unsafe conditions of respondent's kitchen in the dining-car on end of train; (Exs. 1, 2, 3, 4); (63-190);

4. Sharp corner of chef's work table, (65), against which he was thrown or jerked, piercing his side, rupturing his abdomen, producing a protrusion in his side about the size of a hen-egg, (174), which finally caused his death; (345);

5. Train was traveling over a rough track, swayed and rocked violently back and forth, (38);

6. Railroad track had very sharp curves, (38);

7. Train was traveling at a high rate of speed to make up lost time, whipping and jerking dining-car on end of train, (63);

8. Curves and speed caused dining-car to rock and sway back and forth violently, taking occupants off their feet, (38);

9. No signals nor warning given as approach to sharp curves or rough track, (11, 12, 38, 39, 64);

10. No medical nor surgical aid was given by respondent to employee Kane during nearly five hours of suffering and violent vomiting of blood, (81), all this time Kane was in its train and at depot in care and custody of respondent and its agents, (14, 15), although the company physician was duly notified by telegram, Exhibit "8", (226, 227), but the company physician did not arrive until Kane was unconscious and dying, (171, 172), this neglect caused the said employee Kane to die. (345).

That this denial of Trial by Jury, and judgment for respondent, was in violation of the intendment of the 7th and 14th Amendments of the Constitution of the United States, - The Federal Employers' Liability Act, 45 U.S.C.A. Secs. 51, 53, 54, and numerous decisions of this Honorable Court, all of which were duly presented to the Court.

3. That your petitioner duly appealed to the Supreme Court of Missouri, and on September 13, 1954, said

Supreme Court of Missouri, in its opinion, sustained the ruling of the Trial Court, giving judgment for the respondent, thus denying her the right of Trial by Jury, disregarding and ignoring the Constitution and Laws of the United States.

4. That on September 27, 1954, petitioner duly filed in the Supreme Court of Missouri, her **Motion for Rehearing**, specifically again calling the attention of the Supreme Court of Missouri to the fact, (a) that she was a citizen of the United States; (b) This suit was based on the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51, 53, 54, fully construed by decisions of the Supreme Court of the United States, and to deny her the right of trial by jury, was to violate the basic law of the land, citing same in said Motion and accompanying Brief, nevertheless, on October 11, 1954, said Supreme Court of Missouri, by order of record, denied her Motion for Rehearing, (435) thus again violating the intendment of the Constitution and Laws of the United States.

That later, an application and Motion was filed in Division No. 2, of the Supreme Court of Missouri, to Transfer this cause to the Court en Banc; but that said Application and Motion was denied by the Court (438).

That afterwards, a Motion was filed in the Supreme Court of Missouri, en Banc, asking the Court en Banc to make an Order directing the Court in Division No. 2 to Transfer said case to the Supreme Court en Banc, for review but, which said Motion was denied by the Court (439-441).

5. Petitioner further states that her husband Charles Kane, deceased, died while in the service of respondent,

as Chef in the dining-car of respondent, while engaged in Interstate Commerce between the aforementioned states, on its Interstate Railroad, from injuries received while in line of duty, caused by the negligence of respondent, who, after being duly notified (71, 72, 97) by telegram, Exhibit 8 (226, 227) failed to render any medical or surgical aid for nearly 5 hours during all of which time Kane was vomiting large quantities of blood, (113, 114, 116, 120, 132, 133) - except, to order him removed to a Hospital; and, on the way there, or shortly after arriving, he died, (145, 146, 147, 148, 149, 205, 310). Thus, the respondent was guilty of gross negligence in neglecting to call another Doctor, to meet Kane at the Depot, and to give him immediate treatment, instead of ordering him to a Hospital about 2 miles distant from the Union Station. This neglect and negligence caused his death.

6. That a certified copy of the entire record in said case in said Supreme Court of Missouri, is hereby furnished, (417 to 423 inclusive).

7. That your petitioner is advised and believes that the said judgment of the Supreme Court of Missouri, in said case, is Erroneous, and that this Honorable Court should require this cause to be certified to it, for review, and for its determination, in conformity with the provisions of the Judicial Code.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete Transcript of the record and all

proceedings of said Supreme Court of Missouri, in said case, entitled Lennie Kane, Administratrix of the Estate of Charles Kane, deceased, appellant, versus the Chicago, Burlington & Quincy Railroad Company, a corporation, Respondent, No. 43,875, - to the end that said case may be reviewed and determined by this Honorable Court, as provided by the Judicial Code, and that your petitioner may have such other and further relief or remedy, in the premises, as this Court may deem appropriate, and in conformity with the provisions of said Judicial Code; and that the said judgment of the Supreme Court of Missouri, in said case, and every part thereof, may be reversed, by this Honorable Court.

/s/ Lennie Kane,
Petitioner.

United States of America,
State of Missouri,
County of Jackson—ss.

Lennie Kane, of lawful age, being first duly sworn, upon her oath deposes and says, that she is the petitioner herein, that she has read over the above and foregoing Petition to the Supreme Court of the United States, for a Writ of Certiorari, and she declares that the statements and facts therein set forth, are true, as she verily believes.

/s/ Lennie Kane.

Subscribed and sworn to before me, a Notary Public, within and for the County of Jackson, State of Missouri, this 6 day of December, A.D. 1954.

/s/ James L. McMullin,
Notary Public.

My commission expires
October 29, 1956.
(Seal)

Opinion Below.

The decision of the Supreme Court of Missouri is reported in 271 SW (2) 518 (not yet officially reported).

Copy of Opinion is in Record, page 417 et seq.

Constitution and Statute Involved.

7th Amendment to the Constitution of the United States.

14th Amendment to the Constitution of the United States.

Fed. E.L.A. at 45 U.S.C.A. Sec. 51. et seq.
(Set forth in Appendix)

Jurisdiction.

The matter in controversy, exceeds, exclusive of interest and costs, the sum or value of $3,000.00, since petitioner sued for $50,000.00 as damages for the death of her husband.

A Federal question is involved, because the Supreme Court of Missouri, refused to follow the basic law, and its acts amount to a violation of the intendment of the Constitution and laws of the United States.

Questions Presented.

The petition alleges and the evidence shows that for 24 years Charles Kane worked for respondent, a common carrier in its interstate commerce as a Chef in Dining-car serving interstate passengers; that on February 12, 1947, owing to the unsafe place to work, due to the defective appliances and equipment, the rough railroad-track, the exceedingly high-speed of the train, which rocked the car back and forth, caused employee Kane to

be thrown against the sharp corner of a work-table, causing a puncture of his abdomen, FROM WHICH ON April 7, 1947, he bled to death, because respondent railroad failed and neglected to render any medical or surgical aid, to stop the flow of blood, but let him die.

QUESTIONS.

1. Can an Administratrix recover damages for injury and death of her husband, while he was in active service of a common carrier by railroad, in commerce between states, in an action under the Federal Employers' Liability Act?

2. Is it actionable negligence for which a recovery may be had under the Federal Employers' Act, when railroad keeps an unsafe place to work, without hand-holds to grasp when train is in high speed, rocking back and forth, violently jerking and twisting the rear end of train as it goes round sharp-curves, when the Engineer fails to whistle or give warning of defects in track?

3. Is not said railroad required to promptly render medical or surgical aid, for those stricken in their presence and custody while at their post of duty, when the employee is so badly injured that he is incapacitated from caring for himself, and about to die?

Reasons Why Writ Should Be Granted.

I.

Petitioners' application raises substantial and important questions regarding the scope and extent of the protection to employees under the Federal Employers' Liability Act.

II.

Opinion of the Missouri Supreme Court conflicts with and ignores the decisions of this Honorable Court, and raises the issue whether or not recovery can be had for an injury suffered on one date, then later, same employee, while at his post, working for his master, dies from sheer neglect of railroad to render medical or surgical aid, or in any way relieve the suffering employee and let him bleed to death.

III.

The Supreme Court of Missouri in ignoring the Federal Employers' Liability Act violates the rules of statutory construction laid down by this Court in its numerous decisions.

(a) In holding, in effect, that the evidence set forth in petitioners' application herein, did not show negligence on the part of the carrier railroad.

(b) In distinguishing between injuries for which a recovery may be had for negligence under the Federal Employers' Liability Act, and injuries for which recovery may be had under local laws.

(c) Holding, in effect, that the wife of a deceased employee, a Citizen of the United States, in an action under the Federal Employers' Liability Act, had no rights, privileges or immunities necessitating a Trial by Jury.

IV.

It is very essential that a Writ be granted herein, in order to determine important questions involving the interpretation of the Federal Employers' Liability Act, as to the type and nature of injuries which may be the subject of liability.

Prayer.

Wherefore, petitioner prays that a Writ of Certiorari be issued, directed to the Supreme Court of Missouri (En Banc), commanding it to verify and send to this Honorable Court, a correct transcript of the record in the case entitled Lennie Kane, Administratrix of the Estate of Charles Kane, deceased, appellant, versus, Chicago, Burlington & Quincy Railroad Company, respondent, No. 43, 875, to the end that said case may be reviewed and determined by this Honorable body.

ERNEST D. MARTIN,
JAY L. OLDHAM,
Attorneys for Petitioner.

SUPPORTING BRIEF
to the
PETITION FOR A WRIT OF CERTIORARI.

Statement.

Facts with reference to the Jurisdiction, the Opinion below, and the evidence showing negligence, have been sufficiently covered, and need not be repeated.

Specifications of Error.

The Supreme Court of Missouri erred as follows:

1. In refusing the right of Trial by Jury.
2. Disregarded the Constitution and laws of the United States.
3. Misinterpreted an Act of Congress.
4. In refusing to recognize the Federal Employers' Liability Act as controling law.
5. In refusing to follow its provisions governing the question of liability for injury resulting *"in whole or in part"* from any negligence.
6. In refusing to recognize evidence of actual negligence.
7. In ignoring the various decisions of this Court.

History of Case.

It originated in The Circuit Court of Jackson County, Missouri, by petition, under the Federal Employers' Liability Act, to recover damages of $50,000.00 for the injury and death of Charles Kane, deceased, who for 24 years was an employee of respondent, a common carrier by railroad, while engaged in interstate commerce, or commerce between states of Illinois, Missouri, Nebraska, Colorado, et al., because said death resulted from the

negligence of respondent, by reason of its faulty appliances and equipment, its unsafe place to work, negligence of its operating agents, and failure and neglect to give aid to its dying employee, who was permitted for nearly 5 hours, to vomit blood, and die.

In trial-court, at the close of the evidence, a Motion of respondent was sustained, directing jury to render verdict for respondent, the court giving as a reason, "**Want of evidence.**" Thus denying the rights, privileges and immunities of the Citizen, Mrs. Kane, the widow, by denying a trial by Jury, all contrary to the Constitution and laws of the United States.

An appeal was then taken to the Supreme Court of Missouri, the highest court of the State, where the errors of the trial court were presented, briefed and argued; and where on September 13, 1954, it affirmed the ruling of the lower court, gave judgment, thus denying her the right of trial by jury (417).

Motion for Rehearing was duly filed, together with suggestions and brief, specially calling attention to the rights, privileges and immunities of the Citizen of the United States, Mrs. Kane; also, calling attention to the fact this action was under the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, 53, 54; and on October 11, 1954, said Supreme Court of Missouri, overruled said Motion for Rehearing (435).

That later, an Application and Motion was filed in Division No. 2 of said Supreme Court of Missouri, asking said court to transfer to Court en Banc; but said Applica-

tion and Motion was overruled by said court on November 8, 1954 (438).

That later on November 16, 1954 an Application and Motion was filed in the Supreme Court of Missouri en Banc, asking it to order Division No. 2 to transfer this case over to said Court en Banc, for review, but said Motion was, by the Court denied, thus making the judgment final, by the highest court in the State of Missouri (439-441).

Evidence.

The record in this case contains sufficient facts warranting submission to a jury—In fact, said evidence is convincing to the effect that respondent was guilty of negligence, and liable for the death of said employee, as held in the following cases:

Urie v. *Thompson, Trustee,* 337 U.S. 163, 174, 180.

Wilkerson v. *McCarty,* 336 U.S. 53.

Ellis v. *Union Pa. Ry. Co.,* 329 U.S. 649.

Lavender, Adm. v. *Kurn,* 327 U.S. 645.

Tennant v. *Peoria Ry. Co.,* 321 U.S. 29.

Bailey, Admx. v. *Cen. Vt. Ry.,* 319 U.S. 350.

Eglsaer v. *Scandritt, et al.,* 151 Fed. (2) 562, l. c. 566.

ARGUMENT.

I.

Sec. 51 of the Federal Employers' Liability Act is plain and clear. It provides for damages, for everyone suffering any injury while Employed by an Interstate Carrier. In case of death, resuling "In Whole Or In Part" from negligence, then the surviving widow may recover.

This Act should be liberally construed in the light of its provisions, or prime purposes, to-wit: the protection of employees, and their administrators; (*Lilly* v. *Grand Trunk Western Ry. Co.*, 317 U.S. 481, 486, 87 L. Ed. 411, 415). The Act intends that all equipment and appliances shall be in proper condition, safe to operate, and without unnecessary peril to life or limb.

This being the statutory requirement, then clearly, there was no safe place to work, for Kane, in the crowded kitchen, without hand-holds, or other protections of safety required by the Act to protect life against its "Hot-stove, reckless traveling, at high-speed, over rough tracks, sharp-curves, jerking and twisting car back and forth, throwing occupants around everywhere, throwing them against the sharp-corner of work-table, etc.," all of which was for the jury to pass upon, but which was denied.

In *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520, this court said:

> "The twofold problem presented here is first, whether the requisite and specifically hypothesized facts constituting negligence and proximate cause, are a fair

and reasonable permissible inference from all the facts and circumstances and, second the ascertainment of the appropriate rule or test this court is obliged to apply in determining the presence or absence of the sufficiently probative circumstance. For, once the circumstance sufficient to support the inference appears, or can be found in the evidence, the ultimate issue *must* be submitted to the jury".

This court further adds:

"No Court is then justified in substituting its conclusion for those twelve jurors".

Also,

"The absence of eye witnesses was not decisive".

II.

Petitioner was one of the class the Act was passed to protect. Her rights to recover damages for any injury or death of her husband, is given in the Act, as deceased's administratrix.

In the courts below, there was no dispute with reference to the capacity of the widow, to maintain the action, nor that both the Company and employee were engaged in interstate commerce. Leaving the question of sufficiency of the evidence to be viewed, which the Missouri Court held was *"insufficient"*, to be submitted to a jury.

Under the Federal Employers' Liability Act, the evidence submitted in the case was sufficient to submit the case to the jury.

In *Bailey, Admx.* v. *Central Vermont Ry. Inc.*, 319 U.S. 350, 352, 63 S.C.T. 1062, 87 L. Ed. 144,—the Court said:

"The rights which the Act creates are Federal rights, protected by Federal rather then by local rules of law". (l. c. 353) "The jury is the tribunal under our

legal system to decide that type of issue. (*Tiller* v. *Atlantic Coast Line,* 318 U.S. 54), as well as issues involving controverted evidence. (*Jones* v. *East Tennessee V. & G. R. Ry. Co.,* 128 U.S. 443, 445; *Washington U. Georgetown Ry. Co.* v. *McDade,* 135 U.S. 554, 572), to withdraw such a question from the jury, is to usurp its functions. The right to trial by jury is "a basic and fundamental feature of our system of Federal jurisprudence." (*Jacob* v. *New York City,* 315 U.S. 752). It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."

Furthermore, the rule is, that in considering the sufficiency of the evidence, as against a Motion for a directed verdict, or a new trial, then the evidence must be viewed in its light most favorable to plaintiff, and all reasonable inferences drawn therefrom must be in favor of the plaintiff.

III.

The Petition herein, supported by the record, discloses facts and evidence sufficient to authorize a recovery for negligence, under the Federal Employers' Liability Act. It shows that Kane the employee was thrown against the sharp corner of the work-table in carrier's kitchen, which with other evidence, caused his death.

It was not necessary for some eye-witness to so testify. The facts show it. This work-table with a sharp corner was the only thing in the car which could or was capable of causing the rupture of his abdomen, a puncture in his side as long as a finger of the hand and as large as a Hen-egg. This wound in his side, was the exact distance from the floor to his abdomen, as was the sharp corner

of said table was to the floor of car. When they found employee Kane, he was lying on said work-table, the exact thing upon which he was thrown.

This is conclusive proof that the injury happened as alleged.

Since the judgment in the Supreme Court of Missouri, on November 16, 1954, this is petitioner's first opportunity to raise any question of right. (*McComb* v. *County Commissioners,* 91 U.S. 1, 23 L. Ed. 185; *Louisiana Nav. Co.* v. *Oyster Commissioners of Louisiana,* 226 U.S. 99, 33 S. Ct. 78). In this last cited case, the Court held as follows:

> "When a final judgment in form is rendered and the cause brought here for review, it is our duty to consider and pass upon all the Federal controversies in the cause irrespective of how far it may be that the state law such questions were concluded during litigation. (*Chesepeake & O. Ry. Co.* v. *McCabe,* 213 U.S. 207, 214, 53 L. Ed. 765, 768, 29 S. Ct. Rep. 430).

This Court should take jurisdiction of this case, in order to straighten out the Missouri opinion, which conflicts with the decisions of this Court, so that Petitioner can go again back to the Missouri courts with the real law announced on the facts, in proper manner, and according to the rules of right and justice, as indicated should be done, in the said Federal Employers' Liability Act.

In *Lavender, Adm.* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916, this Honorable Court considered a case, where a railroad switchman was found dead, in the railroad yards. It was charged he was killed by a Mail-catcher-arm, striking him on the head, yet, there were

no Eye-witnesses, nor any marks on the train, or on the catcher-arm. Referring to the charge that it required "guess or speculation" to determine the cause of the injury the court said at page 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute, or the evidence is such that fair-minded-men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute, by choosing what seems to them to be the most reasonable inference. Only when there is a *complete absence* of probative facts to support the conclusions reached, does a reversible error appear. But, where as here, there is an evidentiary basis for the jury verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, - it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Also, special attention of this Court is called to page 344 of the Transcript herein, where there is recorded an affidavit of an eminent Physician of Kansas City, which affidavit was duly filed in court and heard below at the Motion for new trial, which among other things, says:

> "I am definitely of the opinion that the accident he (Kane) sustained on February 12, 1947, was the contributing cause of his death on April 7, 1947." (345)

This statement from a man of science abolishes all speculation as to the cause of employee Kane's death, as well as notifies this Court that there is additional evidence in the Transcript which corroborates the finding of this eminent Physician.

IV.

Where an employee in interstate services is engaged in a dangerous work, or has to labor with unsafe appliances or equipment, and while in the performance of his duty, at his post of service, he becomes sick, so that he is rendered physically or mentally incapable of procuring Medical or Surgical assistance for himself, the law imposes upon the employer the duty to immediately procure and to furnish employee all necessary aid and assistance so as to prevent suffering or death. And, that a violation of this duty, constitutes NEGLIGENCE, for which said employer must respond in damages.

Bled to Death.

The record shows that employee Kane, suffering from the injury of February 12, 1947, went to work again wearing a truss; and on April 7, 1947, was found on the train from Omaha, Nebraska, going to St. Louis, Missouri, at his post in the interstate dining-car kitchen at St. Joseph, Missouri, but was found vomiting blood in the dining-car kitchen garbage can. The Company was immediately notified by Telegram. Kane continued to vomit blood in large quantities for nearly 5 hours, but no medical or surgical aid was rendered by the railroad company, and he died vomiting blood. Was not his employer negligent?

In *Urie* v. *Thompson, Trustee*, 337 U.S. 163, 174, 180, Court said:

> "What constitutes negligence for the statute's purpose is a Federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept govern. * * * And, nothing in either the language or the legislative history, discloses express-

> ly any intent to exclude from the Act's coverage any injury resulting "in whole or in part" from the negligence of the carrier. If such an intent can be found, it must be read into the Act by sheer inference. The language is as broad as could be framed. "Any person suffering injury while he is employed". "Such injury or death resulting in "Whole or in part", from negligence of officers, agents, or employees of such carrier". "By reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances", etc. On its face, every injury suffered by any employee while employed by reason of the carriers' negligence was made compensable. * * * To read into this all inclusive wording, a restriction as to the kind of employees covered, the degree of negligence required, or the particular sorts of harm inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court".

In *Eglaser* v. *Scandritt et al.*, 151 Fed (2d) 562, l. c. 566, 7th Circuit 1945, speaking of the Federal Employers' Liability Act, the Court said:

> "The words "in part", have enlarged the field or scope of proximate causes, in these railroad injury cases. These words suggest that there may be a plurality, of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of the latter cause. For instance, the cause may be the first acting cause which was the immediate, the direct cause of the accident".

We submit that under the rulings of this Honorable Court, the facts submitted herein, furnish evidence of negligence on the part of the respondent Railroad Company, sufficient to make out a case submissible to a jury.

Wherefore, in the interest of right and justice, this Honorable Court should issue its Writ to review and determine this controversy, and grant petitioner every possible relief.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

Opinion Below.

The decision of the Supreme Court of Missouri is reported in 271 SW (2) 518. (Not yet officially reported) See pps. 417 to 423 of Tr. of the record herein.

Constitution and Statute Involved.

7th. Amendment to the Constitution of the United States:

> "(In suits at common law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved)".

14th. Amendment to the Constitution of the United States:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,"

Federal Employers' Liability Act, 45 U.S.C.A. Sections 51, 53, 54.

Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; Definition of employees—

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, * * * for such injury or death resulting in whole or in part, from the negli-

gence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as entitled to the benefits of this chapter".

Sec. 53, provides that contributory negligence does not bar recovery, but is to be considered only in diminution of damages.

Sec. 54, abolishes the defense of assumption of risk.

APPENDIX—B.

JUDGMENTS AND OPINIONS OF THE COURTS BELOW.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI.

No. 43,875

Lennie Kane, Administratrix of the Estate of Charles Kane, Deceased,

Plaintiff,

vs.

Chicago, Burlington & Quincy Railroad Company, a Corporation,

Defendant.

(Judgment of the Trial Court entered March 12, 1953) Tr. 332-334.

Pursuant to adjournment as aforesaid, at 10:00 o'clock a.m., Thurday, March 12, 1953, came again the same parties, present and presiding as before, and the trial continued as follows:

The Court: Gentlemen of the jury, at the close of all of the evidence defendant has offered a motion for a directed verdict. Because the evidence is not sufficient to prove the issues the Court has marked it "given".

The court is directing a verdict for the defendant. If you will just sign that as foreman under the instruction of the court.

Gentlemen, you will be discharged from further consideration of this case. Thank you for your patience. It has been a very troublesome case under the law and evidence, and it is necessary for the plaintiff to prove that this fall 51 days before produced a hernia that caused the death. The Court doesn't find any evidence which proves that.

On the other count of careless treatment, it was necessary to prove that the failure to give proper treatment caused his death, and there is no evidence that would justify such finding. Nobody would know whether there is anything that could have been done for this man under the evidence. We have to be governed by what evidence there is here, and there has to be evidence on which a court can decide a case.

The internal hemorrhage of some kind, there has been no expert testimony here to say what caused that internal hemorrhage and no factual evidence except that he did have an internal hemorrhage.

What could have been done to save him? Unless there is something that could have been done to save him, you can't find the defendant guilty of not saving his life. Nobody but God could determine, as they say in some of these cases, what could have been done, so that you can't find that the failure to do something there cost his life.

I am just making that explanation to you because it has all developed into a question of law as to whether there is enough evidence to go to the jury on. The court finds there isn't.

Thank you again for your patience. Your time hasn't been wasted, nor the court's time. This case was here to be tried and this is the only way the court finds that it can be handled under the circumstances.

On March 12, 1953, the jury returned the following verdict:

"We the jury, find the issues for the defendant.

/sgd/ Edmund S. Winchester,
Foreman."

upon which judgment was then entered as follows:

> "Wherefore it is ordered and adjudged by the Court that plaintiff take nothing by this action in her behalf and that said defendant go hence without day and have and recover of and from said plaintiff their costs herin incurred and expended and have therefore execution."

(Judgment and Opinion of Supreme Court of Missouri) Tr. 416-423.

(Caption Omitted)

And thereafter and on the 13th day of September, 1954, the following proceedings were had and entered of record in said cause, to-wit:

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed).

Which said opinion is in words and figures following, to-wit:

Opinion of the Supreme Court of Missouri, Division Number Two, reported in 271 S.W. (2) 518. See pages 417 to 423 of Transcript of Record.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, HONORABLE ALLEN C. SOUTHERN, JUDGE.

This is an action for damages under the Federal Employers' Liability Act, 45 U. S. C., Sec. 51, et seq., alleged to have been sustained by plaintiff, Lennie Kane, as administratrix of the estate of her deceased husband, Charles Kane, as the result of the death of said Charles Kane, allegedly caused by occurrences on February 12, 1947 and April 7, 1947.

The fifth amended petition upon which the case was tried charged that negligence on the part of defendant caused plaintiff's husband, while on duty on February 12, 1947, as a chief cook on a dining car of defendant, to be thrown against a work table and suffer a hernia, and further charged that on April 7, 1947, while on duty on defendant's dining car, deceased became violently ill as a result of said hernia, and that said illness was fatal because of the negligent delay of defendant in securing medical assistance for the deceased.

The trial below resulted in a directed verdict for defendant, and after plaintiff's motion for new trial was overruled, she appealed to this court.

Briefly, the evidence was as follows: On February 12, 1947, the deceased, Charles Kane, was a chef cook for defendant employed in its dining car on a train westbound from St. Louis to Kansas City. The only evidence with reference to whether or not deceased suffered an injury

on that date was the testimony of the witness, Charles Mathews, who was employed on the same dining car on that day. His testimony was that he was in the pantry of the dining car, preparing vegetables and cleaning up and getting ready for dinner; that deceased was in the kitchen of the dining car standing near the serving board. This board separated the kitchen from the pantry. It was "approximately three or three and a quarter feet" higher than the floor of the car. The witness stated that after the train passed Marshall, but before it reached Higginsville, he "noticed Mr. Kane leaning upon the board. Then he called to me and asked me to go get the waiter in charge."

The Court then asked: "Did you see him fall?

The Witness: I didn't see him directly fall, your Honor.

The Court: You don't know what happened?

The Witness: The only thing I saw—

The Court: Did you know what happened to him by having seen it?

The Witness: Well, I wouldn't know exactly what happened to him.

The Court: Did you see anything happen to him?

The Witness: No, I didn't see that.

The Court: Did you see anything happen to the car?

The Witness: Well, the swaying, I saw the train sway. It sways back and forth all the time just like this (indicating), going around those curves. It happened that way, that particular evening.

The Court: Did it happen that way all the time, you say?

The Witness: Yes.

The Court: At that point?

The Witness: There and at other points."

(The negligence charged in the petition was that the defendant caused "said dining car to make an unusual, violent and sudden jerk.")

The witness further testified that he went out and called the head waiter. The latter came into the kitchen and talked to deceased. Then the two sat down at one of the tables in the dining car and filled out some kind of report.

Plaintiff testified that deceased arrived home on the night of February 12th. The next morning she went with him to the office of Dr. E. P. Heller, the company's doctor. She saw Dr. Heller examine deceased for "injury to his stomach—it was a little knot that laid about here on the left side, about the end of my finger (indicating), I would say." After leaving the doctor's office deceased purchased and began to wear a truss. Deceased continued to work, except for his regular relief period, from that time until the date of his death on April 7, 1947.

Early in the morning of April 7, 1947, deceased boarded one of defendant's dining cars at St. Joseph, Missouri, which car was shortly thereafter to be attached to a train bound for Kansas City, Missouri. Soon after deceased boarded the car, he was found vomiting into a garbage can. His fellow employees took him back into the ladies' rest room on the dining car and continued to look in on him from time to time and he was seen to continue vomiting. Soon after the car was attached to the train and left St. Joseph, the waiter in charge put a telegram off the train (directed to defendant's agent at Kansas City) to have the train met with a doctor and a wheel chair, and stating that Chef Cook Kane was ill. This telegram did not reach defendant's agent in Kansas City until five or ten minutes before the train arrived. Deceased continued

to vomit, and his fellow employees obtained the services of a passenger doctor who examined him. Upon arrival in Kansas City, he was taken to the Union Station emergency room by defendant's passenger agent, assisted by station porters and by deceased's fellow employees, and was there placed in bed. Defendant's passenger agent had telephoned Dr. Heller, who was deceased at the time of the trial. Dr. Heller arrived about two hours after deceased arrived and immediately directed him to be sent to Wheatley Hospital, after first attempting to give him some medication which he was unable to do because of lack of equipment at the Union Station emergency room. Deceased died approximately five minutes after arriving at Wheatley Hospital. He had continued to vomit intermittently during all the time he was in the emergency room at the Union Station.

Plaintiff produced no medical evidence whatsoever tending to show the cause of the death of deceased nor in any way tending to connect it with his alleged injury of February 12th, or the claimed failure to render him prompt medical treatment on April 7th. Defendant offered the only medical evidence in the case. This evidence was that deceased died of cardiac enlargement and endocarditis, due to chronic nephritis, with no evidence or indication whatsoever that the death was due to injury or in any way connected with the alleged hernia.

It will be apparent from what follows that we need not discuss the question of whether plaintiff offered any evidence tending to show negligence on the part of defendant in the operation of the train.

The following remarks made to the jury by the learned trial court at the time it sustained defendant's motion for

a directed verdict indicate clearly the basis for the court's action.

"Gentlemen, you will be discharged from further consideration of this case. Thank you for your patience. It has been a very troublesome case under the law and the evidence, and *it is necessary for the plaintiff to prove that this fall 54 days before produced a hernia that caused the death. The Court doesn't find any evidence which proves that.*

"On the other count of careless treatment, *it was necessary to prove that the failure to give proper treatment caused his death, and there is no evidence that would justify such finding.* Nobody would know whether there is anything that could have been done for this man under the evidence. We have to be governed by what evidence there is here, and there has to be evidence on which a court can decide a case. The internal hemorrhage of some kind, there has been no expert testimony here to say what caused that internal hemorrhage and no factual evidence except that he did have an internal hemorrhage. What could have been done to save him? Unless there is something that could have been done to save him, you can't find the defendant guilty of not saving his life. Nobody but God could determine, as they say in some of these cases, what could have been done, so that you can't find the failure to do something there cost him his life. I am just making that explanation to you because it has all developed into a question of law as to whether there is enough evidence to go to the jury on. The court finds there isn't." (Emphasis ours.)

In our opinion, under the evidence, the action of the trial court was correct. The kind of injury deceased received on February 12, 1947 would not naturally and normally result in his death. No layman could know or have any reasonable basis for an inference that it did result from it. Any such inference by a layman would be

but mere guess, conjecture or speculation. The following quotation from the leading case of *O'Leary* v. *Scullin Steel Company,* 303 Mo. 363, 381, fits the case at bar:

> "In the instant case the jury cannot without expert testimony, get at the cause from the other evidence because the evidence has no tendency to prove to the lay mind a relation of cause and effect."

And this court discussing expert medical testimony in the case of *Spencer* v. *Railroad,* 317 Mo. 492, 503, said:

> "Sometimes it is the *only evidence* by which proof can be made." (Citing the *O'Leary* case.)

From plaintiff's standpoint the instant case lacks that kind of evidence. Other cases announcing the same rule are: *Kimmie* v. *Terminal R. R. Ass'n.,* 334 Mo. 596, 66 S.W. (2) 561; and *Cox* v. *Railroad Company,* 335 Mo. 1226, 76 S.W. (2) 411.

Furthermore the rule announced in the case of *Pedigo* v. *Rosenberry,* 340 Mo. 724, 102 S.W. (2) 600 is applicable to the instant case. As we have stated, there was undisputed evidence on the part of the defendant that the death was caused by a heart condition and other pre-existing conditions. We quote the following from the *Pedigo* opinion:

> "The mere fact that injury follows negligence does not necessarily create liability. The burden of establishing by substantial evidence appellants' negligence as charged and the necessary causal connection between such negligence and the injury alleged rested upon respondent. And, if the evidence merely established that the injury might have resulted from several causes for some but not all of which appellants are liable, the necessary causal connection remained in the realm of conjecture and speculation and respondent's case failed. *State ex rel.* v. *Haid,*

325 Mo. 107, 118 (2), 28 S.W. (2d) 97, 102 (5), and cases cited; *Nevinger* v. *Haun*, 197 Mo. App. 416, 428, 196 S.W. 39, 49 (5); *Mitchell* v. *Poole*, 229 Mo. App. 1, 15, 68 S.W. (2d) 833, 839 (6); see, also, *Grindstaff* v. *J. Goldberg, etc., Co.*, 328 Mo. 72, 79, 80, 40 S.W. (2d) 702, 705 (6, 8)."

To sustain her claim that defendant is liable to her because of its alleged failure to render prompt medical treatment to deceased plaintiff relies upon the case of *Hunicke* v. *Quarry Co.*, 262 Mo. 560. That case lays down the rule

> "that just as soon as injury of this character occurs, it then becomes the duty of the master to furnish medical treatment, and if he neglects to use reasonable efforts to do so, *and the evidence shows that in all reasonable probability that failure was the proximate cause of the death,* then the defendant was liable."

And at pages 584 and 585 of that opinion this language appears:

> "In the statement of the case we have set out much of the evidence tending to show the negligence of the defendant in not procuring surgical treatment for Hunicke more promptly; *and that he would not have died had he received prompt treatment.* * * * In other words, we are of the opinion that the evidence tended to show that the company was guilty of negligence in not using more diligence in procuring medical and surgical treatment for this party; *also that it tended to show that said negligence was the proximate cause of his death.*" (Emphasis supplied.)

In the instant case there is no evidence whatever tending to show that the alleged failure of defendant to more promptly furnish medical aid to deceased was the proxi-

mate cause of his death. Thus the holding in the *Hunicke* case does not aid plaintiff.

The judgment is affirmed.

JAMES W. BROADDUS,
Judge, Kansas City Court of Appeals, sitting as Special Judge by transfer order.

ANDERSON, Special Judge, and LEEDY, Acting P. J., concur.

(Motion for rehearing filed September 27, 1954) Tr. 425.

(Motion overruled on October 11, 1954) Tr. 435.

(Application and Order of staying Mandate of Supreme Court of Missouri) Tr. 435-436.

And thereafter on the 26th day of October, 1954, the following further proceedings were had and entered of record in said cause, to-wit:

* * * *

Comes now the appellant, by attorney, and files a motion to stay the mandate, with service shown.

Now at this day the court having seen and considered the motion of the appellant to stay the mandate in the above entitled cause, doth order that said motion be and the same is hereby sustained, and the mandate accordingly stayed for ninety days from the 11th day of October, 1954.

Which motion to stay the mandate is in words and figures following, to-wit:

* * * *

Now comes the above named, Appellant, Lennie Kane, Administratrix by attorneys of record, and states that appellant is making an order with the clerk of this court for a certified copy of the record in the case at bar, with the intention of filing with the clerk of the Supreme Court of the United States, asking for its Writ of Certiorari, to review the decision of this Court, in the above entitled cause, and now moves the Court for an order staying the mandate in said cause for ninety days.

Wherefore: Appellant prays the Court for an order staying the Mandate in said cause for ninety days.

(Order of November 8, 1954 of Division No. 2 of Missouri Supreme Court denying leave to file motion to transfer) Tr. 439.

(Caption Omitted)

And thereafter on the 8th day of November, 1954, the following proceedings were had and entered of record in said cause, to-wit:

Now at this day the court having seen and considered the application of the appellant for leave to file a motion to transfer the above entitled cause to the court en banc, doth order that said application be and the same is hereby denied.

(Order overruling motion to transfer the cause to the Supreme Court of Missouri, en Banc) Tr. 439.

* * * *

And thereafter and on the 16th day of November, 1954, the following further proceedings were had and entered of record in said cause, to-wit:

(Caption Omitted)

Comes now the appellant, by attorney, and files and presents to the court her motion for leave to file en banc a motion to transfer the above entitled cause to the court en banc, and the court having seen and considered said motion doth order that leave be granted, and said motion to transfer to court en banc is filed.

And now on consideration of appellant's motion to transfer the above entitled cause to the court en banc, doth order that said motion be, and the same is hereby overruled.

(Praecipe for Record filed November 22, 1954.)

JAN 31 1955
HAROLD B. WILLEY, Clerk

No. 516.

In the Supreme Court of the United States

October Term, 1954.

LETTIE KANE, Administratix of the Estate of CHARLES KANE, Deceased, *Petitioner*,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

H. M. LASSWORTHY,
CLYDE J. LAMB,
ROBERT B. LASSWORTHY,
900 Union National Bank Bldg.,
Kansas City, Missouri,
Attorneys for Respondent.

INDEX.

PAGE

Brief of respondent in opposition to the petition for writ of certiorari 1

Jurisdiction 2

Questions presented 3

Statement 5

Evidence 7

Summary of argument 11

Argument 14

I. Defendant's motion for a directed verdict at the close of all of the evidence was properly granted because plaintiff failed to make a submissible case for the jury, for the reasons that (a) plaintiff produced no evidence that the alleged injury of February 12, 1947, actually occurred; (b) if the alleged injury of February 12, 1947, actually occurred, plaintiff produced no evidence that it was caused by any negligence of the defendant; (c) plaintiff produced no evidence that decedent's death was caused or contributed to by the alleged injury of February 12, 1947, or by any alleged negligence of defendant on April 7, 1947, and (d) defendant is not liable for any alleged delay in securing medical assistance for the decedent, even if said delay caused or contributed to decedent's death 14

A. There was no evidence that the alleged injury of February 12, 1947, actually occurred 14

B. Even if the alleged injury of February 12, 1947, occurred, there was no evidence that it

PAGE

was caused by any negligence on the part of defendant 16

C. There was no evidence that decedent's death was caused or contributed to by the alleged injury of February 12, 1947, or by any negligence of defendant on April 7, 1947 18

D. Defendant is not liable for any alleged delay in securing medical assistance for the decedent, even if said delay caused or contributed to decedent's death 27

II. The petition for writ of certiorari in this case should be dismissed because petitioner (A) has failed to exhaust her remedies in the state courts, and (B) has failed to comply with the rules of this Court with reference to the form of petitions for writs of certiorari 30

A. The petition for writ of certiorari in this cause should be dismissed because petitioner has failed to exhaust her remedies in the state courts 30

B. The petition herein should be dismissed because petitioner has not complied with the rules of this Court with reference to the form of her petition for writ of certiorari 33

Conclusion 34

Appendix 35

Cases Cited.

Brady v. Southern Ry. Co., 320 U. S. 476, 64 Sup. Ct. 232 (1943) 17

Christianson v. Metropolitan Life Insurance Company, 102 S. W. (2d) 682, 685 (Mo. App. 1937) 26

PAGE

Cox v. Missouri-Kansas-Texas Railroad Company, 335 Mo. 1226, 76 S. W. (2d) 411 (1934) 22

Elgin v. United States, 89 F. Supp. 195, 197 (W. D. Mo. 1950) 24

Gorman v. Washington University, 316 U. S. 98, 62 S. Ct. 962 (1942) 30, 31, 32

Gray v. Missouri Lumber & Mining Co., 177 S. W. 595, 596 (Mo. Sup., 1915) 27

Mullen v. Lowden et al., 344 Mo. 40, 124 S. W. (2d) 1152 (1939) 17

Pedigo v. Roseberry, 340 Mo. 724, 102 S. W. (2d) 600 (1937) 19, 25

Statutes Cited.

45 U. S. C., § 51, et seq. 5

Article V, § 5; R. S. Mo., 1949, §477.010, Constitution of Missouri 31, 36

Article V, §§ 7 and 9, Constitution of Missouri, 1945 ..... 31, 36, 37

R. S. Mo., 1949, § 477.010 ..... 31, 37

Rules of the Supreme Court of the United States.

Rule 23 33

Sub-Rule 1 of Rule 23 33

Sub-Rule 3 of Rule 23 33

Rules of the Missouri Supreme Court.

Rule 1.19 ..... 31, 32, 35

Rule 2.02 ..... 2, 31, 32, 35

Rule 2.03 ..... 32, 36

In the Supreme Court of the United States

October Term, 1954.

LENNIE KANE, Administratix of the Estate of CHARLES KANE, Deceased, *Petitioner,*

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

No. 516.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The petitioner in this action served upon respondent herein a partial petition for writ of certiorari in this Court upon the 22nd day of December, 1954. Said petition was incomplete in that it lacked appendix B, which appendix B was thereafter served upon respondent on the 4th day of January, 1955, and which appendix B includes the judgments and opinions of the Court below. On the 4th day of January, 1955, counsel for the petitioner served upon counsel for the respondent Proof of Service

of the petition for writ of certiorari on the dates as aforesaid, and counsel for respondent are informed that the petition for writ of certiorari and the record* were filed in this Court on the 5th day of January, 1955.

It is the contention of the respondent that the petitioner (1) has not presented, and that the record in this case does not present, any adequate ground for the granting of the writ of certiorari, and (2) has not properly preserved her right to petition for writ of certiorari, and that the petition should therefore be denied or dismissed.

Jurisdiction.

The judgment of the Supreme Court of Missouri was entered against the petitioner on the 13th day of September, 1954 (Tr. 416). The petitioner duly filed in that Court a motion for a rehearing (Tr. 425), which motion was by the Court denied on October 11, 1954 (Tr. 435). Said motion for rehearing was not joined with a motion to transfer the cause to the Supreme Court of Missouri, *en banc,* even though such joinder is permitted by Rule 2.02 of the Supreme Court of Missouri, and a motion to transfer the cause from Division No. 2 of the Supreme Court of Missouri to the Supreme Court of Missouri, *en banc,* was not filed within fifteen days after the opinion of Division No. 2 of the Supreme Court of Missouri was delivered, as required by said Rule 2.02. As indicated

*Counsel for respondent have not been served with and have not been afforded an opportunity of examining (other than cursorily) a copy of the certified transcript of the record which was filed in this Court, but counsel for the respondent believe that the paging of that portion of said transcript consisting of the pleadings and evidence and proceedings in the trial court is the same as the paging of the transcript filed in the Supreme Court of Missouri (of which counsel for respondent have a copy), and that the record of proceedings in the Supreme Court of Missouri follow thereafter in sequence. The numbers in parentheses in this brief are intended to refer to the pages of the certified transcript of the record filed in this Court in accordance with the information above mentioned in respect to the paging thereof.

more fully hereinafter, petitioner applied both to Division No. 2 of the Supreme Court of Missouri and to the Supreme Court of Missouri, *en banc,* for leave to file a motion to transfer the cause to the Court, *en banc,* out of time, and said application was denied on the 8th day of November, 1954, by said Division No. 2 of the Missouri Supreme Court, and was apparently granted on the 16th day of November, 1954, by the Supreme Court of Missouri, *en banc,* after which the motion to transfer was summarily overruled (Tr. 439, petitioner's appendix B, page 37). As more fully set forth hereinafter in respondent's argument, it is respondent's position that petitioner did not exhaust her rights in the Supreme Court of Missouri in that she failed to make timely filing of a motion to transfer the cause to the Supreme Court of Missouri, *en banc,* and that for this reason, this Court is without jurisdiction to entertain the petition for writ of certiorari presently before the Court. There are set forth in the Appendix to respondent's brief the pertinent portions of the Rules of the Supreme Court of Missouri with reference to this point.

Questions Presented.

We respectfully submit that the questions set forth on page 8 of the petition herein do not fairly and correctly set forth the questions which will be before this Court in considering whether it should entertain and grant a writ of certiorari in this case. We submit that the questions actually involved are as follows:

1. Did the state courts below err in finding and holding as a matter of law that plaintiff (petitioner herein) had not made any case which should be submitted to a jury in an action under the Federal Employer's Liability Act, where the evidence adduced before the jury was com-

pletely barren of any indication that the death was in any way caused by (a) injury, or (b) any alleged delay in treatment, or (c) any negligence attributable to the defendant (respondent herein)?

2. Are the state courts, in actions under the Federal Employer's Liability Act, required, in all events and regardless of whether or not any evidence of a submissible case is adduced, to submit all cases under such Act to a jury?

3. May a petitioner obtain a writ of certiorari in this Court (a) after a failure to file a timely motion in the Missouri Supreme Court to transfer the cause from a Division of said Court to the Missouri Supreme Court, *en banc,* and (b) after a failure to comply with the rules of this Court governing the form of petitions for certiorari?

STATEMENT.

There are certain inaccuracies in the petitioner's statement concerning some of the pertinent facts in the case and the issues involved, and it is therefore necessary for the respondent to present a short statement of the matters involved.

This is an action for damages under the Federal Employer's Liability Act, 45 U. S. C., §51, *et seq.*, alleged to have been sustained by plaintiff,* as administratix of the estate of her deceased husband, Charles Kane, as a result of the death of said Charles Kane, allegedly caused by occurrences on February 12, 1947, and on April 7, 1947.

Plaintiff filed this suit on April 7, 1948, in the Circuit Court of Jackson County, Missouri, at Kansas City, seeking to recover the sum of $30,000.00 for the death of her said husband. Thereafter, plaintiff filed four separate amended petitions, and on the 20th day of February, 1953, approximately seventeen days before the cause came on for trial, plaintiff filed her fifth amended petition for damages, on which the case was tried, and which prayed damages in the sum of $50,000.00 for the death of her husband. The petition charged that negligence on the part of defendant caused plaintiff's husband, while on duty on February 12, 1947, as a chef cook on a dining car of defendant, to be thrown against a work table and suffer a hernia, and further charged that on April 7, 1947, while on duty on defendant's dining car, deceased became violently ill as a result of said hernia, and that said illness was fatal because of the negligent delay of defendant in securing medical assistance for the deceased. On March

*Plaintiff below is the petitioner herein and defendant below is the respondent herein. For convenience, the parties will be designated plaintiff and defendant.

9, 1953, just before the case went to trial, defendant filed its answer to the fifth amended petition for damages, admitting the death of Charles Kane on April 7, 1947, admitting his employment by defendant, admitting the formal matters, and denying all other averments.

The trial in the Circuit Court of Jackson County, Missouri, at Kansas City, resulted in a directed verdict for defendant, and after plaintiff's motion for a new trial was overruled, she appealed to the Supreme Court of Missouri, where this cause was placed on the docket of Division No. 2 of the Supreme Court of Missouri, April Session, 1954, and was assigned docket No. 43875 in said Court. As indicated in petitioner's Appendix B filed in this Court, and at page 416 of the transcript, on the 13th day of September, 1954, Division No. 2 of the Supreme Court of Missouri entered its judgment affirming the judgment of the Circuit Court of Jackson County, Missouri, at Kansas City, in all respects. Plaintiff filed a motion for rehearing in said Court on September 27, 1954 (Tr. 425), and said motion was overruled by said Division No. 2 of said Court on October 11, 1954 (Tr. 435). On November 8, 1954, Division No. 2 of the Supreme Court of Missouri entered an order denying the application of plaintiff for leave to file a motion to transfer the cause to the Supreme Court of Missouri, *en banc,* and on the 16th day of November, 1954, the Supreme Court of Missouri, *en banc,* granted a similar application and summarily denied the motion to transfer (Tr. 439).

Evidence.

The evidence, as viewed most favorably for the plaintiff, and limited to the relevant, competent and material evidence adduced at the trial before the jury, was as follows:

On February 12, 1947, the deceased was a chef cook for defendant employed in its dining car on a train westbound from St. Louis to Kansas City, working in the galley on said car (R. 26, 38). At a certain point in said trip, at a place where the defendant's tracks had "lots of curves," causing the car to sway to a certain extent, a fellow employee of the deceased, after seeing the deceased going about his usual duties in the galley, not five minutes later saw him lying partly over on the surface of the work table (R. 28, 33-41, 62-64, 81). There was no unusual jerk, according to plaintiff's own evidence (R. 34-35, 37), which evidence was that the train was swaying at that time and place as it did every day. After that, deceased sat down at one of the tables in the dining car and filled out some kind of form (R. 67-69). The next morning the deceased and his wife went to see Dr. E. P. Heller and thereafter deceased purchased and began to wear a truss (R. 156-158, 161). Deceased continued to work except for his relief time from that time until the time of his death (R. 159-164).

Early in the morning of April 7, 1947, deceased boarded one of defendant's dining cars in St. Joseph, Missouri, which car was shortly thereafter to be attached to a train bound for Kansas City, Missouri (R. 96, 98). Soon after deceased boarded the car, he was found vomiting into a garbage can (R. 72-74, 96-97). His fellow employees took him back into the ladies' room on the dining car and continued to look in on him from time to time and he was seen to continue vomiting (R. 96-98). Soon after the car was attached to the train and left St. Joseph, the waiter

in charge put a telegram off the train (directed to defendant's agent at Kansas City) to have the train met with a doctor and a wheel chair (R. 99-100), and stating that Chef Cook Kane was ill. Defendant's undisputed evidence is that this telegram did not reach the defendant's agent in Kansas City until five or ten minutes before the train arrived (R. 204-205, 229, 313). Deceased continued to vomit, and his fellow employees obtained the services of a passenger doctor who examined him (R. 77-78, 102-104). Upon arrival in Kansas City, he was taken to the Union Station emergency room by defendant's passenger agent, assisted by station porters and by deceased's fellow employees, and was there placed in a bed (R. 106, 140, 206-208). The undisputed evidence is that the passenger agent of the defendant had telephoned Dr. Heller, who was deceased at the time of the trial (R. 205, 268, 276). Dr. Heller arrived about two and one-half hours after deceased arrived and, after first attempting to give him some medication which he was unable to do because of lack of facilities at the Union Station emergency room, immediately directed him to be sent to Wheatley Hospital (R. 142-145, 169-171, 183). Deceased died approximately three or four minutes after he arrived at Wheatley Hospital (R. 184). He had continued to vomit intermittently during the time he was in the emergency room at the Union Station (R. 146-147).

Plaintiff produced no medical evidence whatsoever tending to show the cause of the death of deceased nor in any way tending to connect it with anything for which the defendant might be claimed to be responsible or liable.

We respectfully wish to bring to the Court's attention several apparent misstatements contained in petitioner's petition for writ of certiorari and in the supporting brief and argument appended thereto.

In paragraph 2 of the petition proper (page 2 of the printed document filed by petitioner), there are set forth ten subparagraphs purporting to state in detail the manner in which respondent was guilty of negligence. It is submitted that, despite the fact that plaintiff's fifth amended petition for damages occupies more than eight pages in the typewritten record as filed in the Missouri Supreme Court, and although said petition purports to plead specific negligence as is the practice in the state courts of Missouri (particularly in paragraph 4 of the petition, including the subparagraphs thereof, and in paragraphs 5 and 6 of said petition), nowhere is there pleaded in said fifth amended petition the charges of negligence contained in subparagraphs 1, 3, 5, 6, 7, and 8 of the said paragraph 2 of plaintiff's petition for writ of certiorari (page 2 of her printed petition filed in this Court).

Furthermore, on pages 4, 12 and 13 of her printed petition, reference is made to the filing by petitioner in Division No. 2 of the Supreme Court of Missouri and in the Supreme Court of Missouri, *en banc*, of a motion to transfer the cause from Division No. 2 to the Court, *en banc*, and further reference is made to the motion to transfer being overruled. Actually, as the record will show, and as shown on page 36 of petitioner's Appendix B, the action of Division No. 2 of said Court was to deny leave to file a motion to transfer the cause to the Court, *en banc*, and while it appears on page 37 of petitioner's Appendix B that the Supreme Court of Missouri, *en banc*, did grant leave to file the motion to transfer, it further appears that the said motion was forthwith and summarily overruled. (The pertinent portions of the Rules of the Supreme court of Missouri with reference to the time for filing such motions are set forth in the appendix to this brief).

Paragraph numbered 5 of plaintiff's petition proper (pages 4 and 5 of the printed petition), purports to make a further statement of the facts in this case, which statement we submit is not entirely correct. It is there stated, among other things, that the deceased died while in the service of respondent from injuries received while in line of duty. As has been found by both courts below, the record is entirely barren of any evidence that deceased died as a result of any injuries whatsoever, and the only evidence in the case was that offered by defendant, namely that the deceased died of other causes, as hereinbefore set forth. Furthermore, it is stated in said paragraph 5 that the failure to call another doctor and the failure of the deceased to receive immediate treatment caused his death, whereas in fact there was no evidence that any alleged delay in treatment had any connection with the death.

Again, on page 14 of petitioner's printed document (under point No. I of the Argument constituting a part of the Supporting Brief to the Petition for Writ of Certiorari, in the fourth through the eighth lines of the second paragraph printed in lightface type on that page), there appears a quoted statement which purports to set forth some of the issues of negligence herein and which seems to imply that the matter in quotation marks is quoted from the Fifth Amended Petition for Damages, whereas we are unable to find these quoted charges appearing anywhere in said petition, nor are most of these charges referred to in the evidence. It will be noted that no reference to the record is given to show the source of this quotation.

SUMMARY OF ARGUMENT.

1. The petitioner, in the trial of the case, failed to adduce any evidence sufficient to make a submissible case for the jury, for the reasons that (a) there was no evidence that the alleged injury of February 12, 1947, actually occurred, or if it occurred that it was caused by any negligence of the respondent (defendant); (b) there was no evidence that the death was caused or contributed to by the alleged injury of February 12, 1947, or by any alleged negligence of defendant on April 7, 1947, and (c) there was no evidence tending to establish that defendant was responsible for any delay which may have occurred in securing medical assistance for the decedent.

A. The only evidence as to any occurrence of February 12, 1947, was that at a place where the defendant's tracks were curving and the car was swaying to a certain extent, a fellow employee found the deceased lying partly over on the surface of a work table in the galley after last having seen the deceased less than five minutes earlier going about his usual duties in the galley. There was no unusual jerk. We submit that this evidence is not sufficient to justify submitting to the jury the question of whether or not the deceased was injured on said dining car on said date.

B. Even if the alleged injury of February 12, 1947, occurred, there was no evidence of any unusual jerk or movement of the dining car at the time when the alleged injury is supposed to have occurred, upon which to base any finding of negligence.

C. There was no evidence either (i) that the alleged delay in obtaining medical aid for the deceased on April 7, 1947, had any connection with his death or (ii) that

the alleged injury sustained by the deceased on February 12, 1947, had any connection with his death. The affidavit of W. F. McCarthy, M.D., filed in this cause after verdict and judgment, should be disregarded for all purposes, as not having been adduced before the jury, nor as newly discovered evidence. The only medical evidence offered in the cause before the jury was that the death was caused by antecedent conditions in decedent's body which had no connection with any alleged act or neglect of defendant.

D. There is no evidence of any *avoidable* delay in obtaining treatment for the deceased prior to the arrival of his train at Union Station, Kansas City, Missouri. At that point, a competent physician engaged in the general practice, not an employee of the defendant, was summoned, and also deceased's wife (petitioner herein) was summoned. Meanwhile the stricken man was in the care of an attendant at the Union Station emergency hospital, which attendant was not an employee of the defendant, and also deceased's wife arrived at the Union Station shortly thereafter, so that if it became necessary to summon another physician, either of these two persons could have readily done so, and defendant had no further duty in the premises. Therefore, there is nothing in connection with any alleged delay in obtaining treatment for the deceased that can be attributed to defendant.

2. This Court should not take jurisdiction to grant a writ of certiorari in this cause for the reason that petitioner has failed to exhaust her remedies in the state court, in that she failed to make timely application for transfer of the cause to the Missouri Supreme Court, *en banc*, and such motion was never filed in Division No. 2 of the Missouri Supreme Court as prescribed by the Rules of the Supreme Court of Missouri. Such motion was filed out of time in the Supreme Court of Missouri, *en*

banc, but was promptly overruled, and in passing upon the said motion, the Supreme Court of Missouri, *en banc,* did not afford respondent an opportunity to file suggestions in opposition to such motion (as is customarily done), indicating that the consideration of the motion was purely perfunctory.

ARGUMENT.

I.

Defendant's motion for a directed verdict at the close of all of the evidence was properly granted because plaintiff failed to make a submissible case for the jury, for the reasons that (a) plaintiff produced no evidence that the alleged injury of February 12, 1947, actually occurred; (b) if the alleged injury of February 12, 1947, actually occurred, plaintiff produced no evidence that it was caused by any negligence of the defendant; (c) plaintiff produced no evidence that decedent's death was caused or contributed to by the alleged injury of February 12, 1947, or by any alleged negligence of defendant on April 7, 1947, and (d) defendant is not liable for any alleged delay in securing medical assistance for the decedent, even if said delay caused or contributed to decedent's death.

A. There was no evidence that the alleged injury of February 12, 1947, actually occurred.

The only evidence with reference to whether or not the deceased suffered an injury on February 12, 1947, while in the course of his employment for the defendant on its dining car, was the testimony of the witness, Charles Mathews, who was employed on the same dining car on that day. His testimony was that he was in the pantry of the dining car, preparing vegetables and cleaning up and getting ready for dinner (R. 27), and the deceased was in the kitchen of the dining car, standing near his work table (R. 38-40). The witness saw the deceased as they were both working, from time to time, and after the last time he saw deceased working, shortly thereafter, he saw the deceased with the upper part of his body lying on the work table and his feet still standing on the same platform on which they had been standing while he was working (R. 37-39, 80-81). The time interval between

the moment at which the witness last saw the deceased going about his work and the moment when he saw him lying on the work table was put at less than five minutes (R. 39). The evidence was that there was no unusual movement of the car, but on the contrary, that the car was swaying back and forth *just as it did all the time,* at this point and at other points (R. 35-37). The witness flatly stated that he did not see the deceased fall (R. 39). This witness did not even state to the jury that the swaying of the train caused the witness to fall, and, of course, if such statement had been made in the presence of the jury, it would have been subject to objection as being a mere conclusion of the witness, especially in view of the fact that he did not see the deceased fall. Plaintiff attempted to prove by this witness that there was an outcry by the deceased or an exclamation of some sort, but the court at first properly excluded such testimony in the absence of any proof of an accident or unusual occurrence (R. 36, 38, 42, 44, 45), but thereafter the court overruled defendant's objection to testimony of the witness concerning the outcry or exclamation by deceased that he was hurt, and ruled that the witness would be permitted to testify as to these statements by the deceased (R. 60-61). However, after this ruling by the court (which we submit was incorrect for the reason that no accident or occurrence had been established to justify the application of the *res gestae* rule under which the court presumably admitted such testimony), plaintiff did not interrogate this witness about the exclamation or outcry, and therefore there was no evidence before the jury of any such outcry or exclamation. We submit that such exclamation or outcry, if any, may not be considered in passing upon the sufficiency of plaintiff's case for the jury, for the reason that such testimony would be entirely inadmissible

as hearsay. In any event, the testimony was not actually adduced before the jury.

Therefore, the only evidence plaintiff offered for the purpose of showing that there was an accident on February 12, 1947, was the evidence that the witness saw the deceased going about his work and shortly thereafter saw him lying upon his work table, with his feet still upon the same surface where they had theretofore been. Inasmuch as such conduct on the part of the deceased could have been caused by illness or fatigue rather than injury resulting from accident, we submit that it is clear that there was not sufficient evidence to justify submitting to the jury the question of whether or not deceased was injured on the said dining car on February 12, 1947.

B. Even if the alleged injury of February 12, 1947, occurred, there was no evidence that it was caused by any negligence on the part of defendant.

As pointed out hereinbefore, the witness Mathews affirmatively testified that there was no unusual jerk or sway of the car at the time of the alleged accident, but rather that the alleged accident occurred on a curving stretch of track where the train ordinarily swayed quite a bit. Mathews was the only witness on this point, and there was no evidence introduced in support of the other allegations of negligence set out in paragraph 4(a) through 4(e), inclusive, of the petition (R. 11) (except that there was some evidence with reference to the sharp corners mentioned in 4(d), which, without an unusual jerk, we submit would be insufficient to establish any negligence of defendant). We submit that it is not possible for plaintiff to make a case against defendant for any alleged after-effects of the alleged injury of February 12, 1947, without introducing evidence of an unusual jerk or move-

ment of the dining car at the time when the alleged injury is supposed to have occurred on February 12, 1947.

Mullen v. *Lowden et al.*, 344 Mo. 40, 124 S. W. (2d) 1152 (1939), was an action under the Federal Employers' Liability Act for damages for the death of plaintiff's husband. The court held that plaintiff did not make a case sufficient to go to the jury, and stated at 344 Mo. 47, 124 S. W. 2d 1155:

> "However, even if it be conceded that Mullen fell off after this signal was given, plaintiff still failed to make a case either on the theory (failure to stop) submitted, or on the theory (causing a jerk) which the court refused to submit. As to the latter, it is only necessary to say that the positive evidence of plaintiff's witnesses was that the train was smoothly handled and that there was no unusual jerk or jar. Some of plaintiff's experts testified (on hypothetical questions) that such a train (with five gravel cars behind the tender) under the circumstances shown (drifting down grade at five miles per hour) could not be caused to increase speed on an upgrade without jarring and jerking, and said that 'it will happen every time.' But this could only mean that the jars resulting would be those of usual and ordinary handling of the train. Of course, that does not show negligence."

We submit that there is no question in this case but that the evidence did not show negligence in the handling of the train. It is common knowledge that all trains are subject to a certain amount of swaying, and as shown by the above case there must be evidence of an unusual jerk in order to show any kind of negligence on the part of the defendant railroad company.

This Court, in *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 64 Sup. Ct. 232 (1943), affirmed a judgment of the

Supreme Court of North Carolina which had reversed a judgment for the plaintiff in a case under the Federal Employers' Liability Act on the ground that the case should not have been submitted to the jury. In determining that no submissible case was made, this Court stated (320 U. S. page 484, 64 Sup Ct. pages 236-37):

> "* * * Liability arises from negligence not from injury under this Act. And that negligence *must be the cause of the injury.* * * * The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence *must be a link in an unbroken chain of reasonably foreseeable events.*" (Emphasis supplied.)

From all of the foregoing we respectfully ssubmit that the court was justified in refusing to submit this case to the jury on the ground that there was no evidence whatsoever of negligence on the part of defendant in connection with the alleged accident on February 12, 1947.

C. There was no evidence that decedent's death was caused or contributed to by the alleged injury of February 12, 1947, or by any negligence of defendant on April 7, 1947.

Plaintiff did not produce any evidence that the alleged delay in obtaining medical aid for the deceased had any connection with his death, nor that the alleged hernia sustained by deceased nearly two months prior to his death had any connection with the death. (As pointed out hereinbelow in this portion of defendant's brief, the affidavit of W. F. McCarthy, M.D., filed in this cause after the verdict and judgment were entered and after the filing of plaintiff's motion for new trial, should be disregarded for all purposes, but even if it is not disregarded, we submit that it is too vague and general to afford any basis for contending that here was any causal connection between

the death and the alleged hernia or alleged delay in treatment.) Plaintiff would have the court submit to a lay jury evidence of the alleged hernia nearly two months before, and evidence of the alleged delay in obtaining medical assistance for the deceased, and let the jury of laymen speculate as to whether or not these factors caused decedent's death. There was undisputed medical evidence on behalf of defendant that the death was caused by antecedent physical conditions in decedent's body which had no connection with any alleged act or neglect of defendant. The fact that such a case cannot be submitted to a jury without more is supported by at least two recognized rules of law: (1) Where the decedent's death may have been produced by two or more causes, only one of which is such that defendant is chargeable therefor, then plaintiff must produce prima facie evidence that such cause produced the death, and if he fails to do so, then he does not make a submissible case for the jury; (2) Where the main ultimate fact issue to be determined by the jury is beyond the general experience and common knowledge of mankind, such issue must be established through the testimony of those possessing the necessary qualifications to observe accurately, reason correctly, and report truly thereon.

Taking up the two above stated rules of law in inverse order for convenience in argument, the application of the rule stated above as (2) to the present case would be as follows: Can the court submit to a lay jury a question that professionals are generally called upon to determine, in the absence of any testimony or evidence from an expert in the field involved? The answer to this question is in the negative, as is brought out by the cases which set forth the rule of law enunciated above as (2). The case of *Pedigo* v. *Roseberry*, 340 Mo. 724, 102 S. W. (2d) 600 (1937), was a civil action for damages for malpractice

against two physicians. The verdict was for the defendants and the plaintiffs appealed. Plaintiffs complained about one of the defendants' instructions which in effect told the jury that the question at bar was not to be determined except by the opinion of medical and surgical experts and that the jury was not to consider the opinions of laymen in that connection. The Supreme Court of Missouri, in approving this instruction, stated as follows at 340 Mo. 734, 102 S. W. (2d) 606:

> "There are, however, subjects of litigation, though comparatively few, involving a main ultimate fact issue not within, but beyond, the general experience and common knowledge of mankind, for the determination of which 'scientific' experience is indispensable and the necessary testimonial qualifications may be acquired only through the systematic and thorough study of, training in, and application of knowledge to the science or art involved. The logic of such a situation (more forcibly than the logic which excludes opinion testimony where jurors possess the necessary experiential capacity) requires the establishment of the ultimate fact through the testimony of those possessing the necessary testimonial qualifications to observe accurately, reason correctly and report truly thereon."

The Court further stated in this same connection at 340 Mo. 736-737, 102 S. W. (2d) 607-8:

> "If laymen are not to be guided on issues requiring peculiar and thorough special training in a science or art beyond the experience and knowledge common to mankind by witnesses possessing the necessary testimonial qualifications, juries will be cast into a river of doubt and must establish an arbitrary standard of their own founded upon conjecture and surmise in their effort to reach certain and sure ground.

Juries should not be thus turned loose and privileged to say, perchance, the method of treating an injury of the nature here involved was negligent nothwithstanding, for instance, the uncontradicted competent testimony establish that the uniformly adopted practice of the most skillful surgeons had been followed. Notwithstanding the prerogative of practicing lawyers, the general public, no doubt, considers the members of the judiciary competent to observe accurately, reason correctly and report truly on intricate and involved legal issues, but would not place such confidence in their testimonial qualifications on an issue involving the intricacies of, for instance, television, Einstein's theory of relativity, etc. Nor should a jury of laymen be permitted to establish by laical conjecture and surmise the degree of care and skill exacted of a practicing lawyer in the handling of intricate and involved legal issues. On litigated legal issues both litigants cannot prevail. Upon such subjects experience teaches us that reliance must be placed in those qualified and skilled in the science or art involved."

Thus, in the case at bar, plaintiff would have laymen decide whether or not an alleged hernia nearly two months earlier could have caused decedent's death under the circumstances here involved, and whether the alleged delay in obtaining medical treatment for the decedent could have caused his death under these circumstances. Defendant submits that this would be doing exactly what the Supreme Court of Missouri condemned in *Pedigo* v. *Roseberry*, namely, the jury would be "cast into a river of doubt" and would have had to "establish an arbitrary standard of their own founded upon conjecture and surmise in their effort to reach certain and sure ground." As the Court stated in the *Pedigo* case, juries should not be thus turned loose.

Cox v. *Missouri-Kansas-Texas Railroad Company*, 335 Mo. 1226, 76 S. W. (2d) 411 (1934), was a suit brought under the Federal Employers' Liability Act by a machinist employed by the defendant railroad for the loss of his hand. The evidence was that his hand was struck by a sledge hammer by a fellow employee, resulting in a wound or bruise on the back of his hand about an inch long, breaking the skin but not severe enough to cause plaintiff to cease his regular work, even temporarily. The wound did not entirely heal and about a year later it was determined that a cancer was forming or becoming malignant and this necessitated the amputation of the hand. The Court stated at 335 Mo. 1235-1236, 76 S. W. (2d) 415-416:

> "The serious question is whether the cancer was caused by and resulted from the injury inflicted by the hammer striking the plaintiff's hand on the occasion in question or was caused by other previous injuries to plaintiff's same hand, which previous injuries plaintiff admitted, or from some natural or unknown cause. This question can be determined only from the medical evidence. Such evidence was to the effect that the basic cause of cancer is unknown, but that cancer may and does at times result from trauma or external violence but more often from natural or unknown causes. Without going into detail here, it will suffice to say that no physician or surgeon who treated plaintiff for this cancer, nor the surgeon who amputated the arm, testified for plaintiff or gave evidence to support his claim that the cancer which developed on the hand was caused by or resulted from the particular injury in question. Being called by defendant, their evidence was to the contrary. A single expert witness, who had never treated plaintiff's injury or seen same before the arm was amputated, testified for plaintiff and his evidence in answer to a hypothetical question based on plaintiff's evidence as to the facts connected with his injury

went no further than that the cancer in question might or could have resulted from the hammer injury in question. The cancer on plaintiff's hand was not the natural or usual result of the injury caused by striking with the hammer, and it is a settled rule of this court that in such a case it is necessary for plaintiff to show a causal connection between the injury and the cancer, and it is not sufficient for this purpose to merely show that such injury to the hand might or could have caused the subsequent cancer. There is not, therefore, sufficient evidence in the record to sustain the jury's verdict for the loss of plaintiff's hand and any other verdict would be merely nominal. *O'Leary* v. *Scullin Steel Co.*, 303 Mo. 363, 260 S. W. 55. In *Kimmie* v. *Terminal R. R. Ass'n* (Mo.), 66 S. W. (2d) 561, 564, it was claimed that a fall on the end of a tie by reason of a defective engine step caused a cancer to develop later. There, as here, the only evidence as to the causal connection between the fall and the cancer was that of a medical expert who testified that such fall 'might, could, or would' cause the cancer. This Court said: 'It [cancer] was certainly an unusual and not an ordinary or natural result of such a fall. No layman could know or have any reasonable basis for an inference that it did result from it. The opinion of the doctors that it might, could, or would result from the fall is no more than an assurance that such a result was scientifically possible. *Edmondson* v. *Hotels Statler Co.*, 306 Mo. 216, 267 S. W. 612; *Meyers* v. *Wells* (Mo. Sup.), 273 S. W. 110; *Mueller* v. *St. Louis Pub. Ser. Co.* (Mo. App.), 44 S. W. (2d) 875, and cases cited. It was not substantial evidence that it did result from it and there was not here other ample evidence, "tending to exclude all other causes save the fall and to prove that the fall was the cause," as in those cases. No other evidence of the doctors went further than to show possibility. They admitted that the causes of cancer are usually unknown.' And at page 565 of 66 S. W. (2d) it was further said: 'Considered in the

light most favorable to plaintiff, this evidence was too insubstantial and uncertain to justify finding that the fall caused the tumor. It left the whole matter to speculation and conjecture. See, also, *Plank* v. *R. J. Brown Petroleum Co.*, 332 Mo. 1150, 61 S. W. (2d) 328; *Bante* v. *Wells* (Mo. App.), 34 S. W. (2d) 980, and cases cited. * * * It would seem that the evidence here is too indefinite and uncertain to meet the required test, but leaves it all in the realm of speculation.' In *Adelsberger* v. *Sheehy*, 332 Mo. 954, 59 S. W. (2d) 644, 646, plaintiff received direct injury, though not very severe, from external violence and later a bad condition of the heart developed. A medical expert testified that the bad condition of the heart could have been caused by the injury received, but this court held that such evidence was not sufficient to make a case for the jury, and said: 'If the heart condition was caused by ravages of the disease, defendant is not liable therefor. The burden was on the plaintiff to show the cause. Evidence that the condition might or could have been caused by either injury or disease without any substantial showing as to which of the possible causes did produce the condition, furnishes no basis from which a jury could determine the cause. *O'Leary* v. *Scullin Steel Co.*, 303 Mo. 363, 375, 260 S. W. 55.' Tested by the rule announced in this and the other cases cited, the evidence is not sufficient to sustain the verdict."

The *Cox* case and the cases cited and quoted in the *Cox* opinion all indicate that a lay jury cannot be permitted to speculate as to the cause and effect in the realms of knowledge in which only a medical expert is competent. A similar result in respect to causation of cancer was reached under the Federal Tort Claims Act in *Elgin* v. *United States*, 89 F. Supp. 195, 197 (W. D. Mo. 1950).

The question of causation in the cancer cases and also in the heart case mentioned above in the *Cox* opinion are

very similar to the cause and effect questions in the present case, namely, "Did the alleged hernia cause the death?" and "Did the delay in medical treatment cause the death?" We submit that plaintiff cannot make a case in a situation like this without medical testimony that these factors did actually cause the death. Even if plaintiff had (which she did not) medical testimony that these factors *might have* produced the death, under the above cited and quoted cases, such testimony would not be enough to make a case for the jury.

Furthermore, under the rule above stated as (1) (to the effect that where the death may have been produced by two or more causes, only one of which defendant is chargeable for, then plaintiff must show that such cause produced the death), this case is not submissible. In *Pedigo* v. *Rosenberry, supra,* the Court stated at 340 Mo. 737-738, 102 S. W. (2d) 608:

> "The mere fact that injury follows negligence does not necessarily create liability. The burden of establishing by substantial evidence appellants' negligence as charged and the necessary causal connection between such negligence and the injury alleged rested upon respondent. And, if the evidence merely established that the injury might have resulted from several causes for some but not all of which appellants were liable, the necessary causal connection remained in the realm of conjecture and speculation and respondent's case failed. *State ex. rel* v. *Haid,* 325 Mo. 107, 118 (2), 28 S. W. (2d) 97, 102 (5), and cases cited; *Nevinger* v. *Haun,* 197 Mo. App. 416, 428, 196 S. W. 39, 42 (5); *Mitchell* v. *Poole,* 229 Mo. App. 1, 15, 68 S. W. (2d) 833, 839 (6); see, also, *Grindstaff* v. *J. Goldberg, etc., Co.,* 328 Mo. 72, 79, 80, 40 S. W. (2d) 702, 705 (6, 8)."

The foregoing is applicable to the situation in the present case. There was undisputed evidence on the part of de-

fendant that the death was caused by a heart condition and other pre-existing conditions. Even if plaintiff's evidence is sufficient to permit the jury to infer that death *might* have been caused by some alleged act of negligence on the part of defendant (which defendant denies) it nevertheless was not sufficient to negative the causes which defendant's evidence disclosed.

This same rule is set forth in a little different language in *Christianson* v. *Metropolitan Life Insurance Company*, 102 S. W. (2d) 682, 685 (Mo. App. 1937), a case involving a suit under an accidental death insurance policy:

> "The plaintiff, of course, must prove his case. Where there is presented two or more causes that could reasonably result in death and but one is covered by contract of insurance, the fact that the cause within the coverage might or could produce death is not sufficient to sustain a conclusion that it did cause the death."

The principle just stated, we submit, is applicable to the present case.

Shortly after plaintiff filed her motion for new trial, she filed an affidavit of W. F. McCarthy, M.D., purporting to set forth the opinion of the affiant with reference to the causal connection between defendant's alleged negligence and decedent's death. Nowhere in said affidavit or in the motion for new trial is there even an attempt to show that this affidavit is based upon newly discovered evidence, and we do not understand that plaintiff is contending that the affidavit should be relied upon as indicating newly discovered evidence. Shortly after the filing of said affidavit, defendant filed its motion to strike the said affidavit (R. 345-347), which said motion was argued together with plaintiff's motion for new trial, but said motion to strike was not passed upon by the trial court (R. 347).

It seems clear that this affidavit should not be considered in passing upon the question of whether plaintiff made a submissible case for the jury and of whether the trial court acted correctly in granting a directed verdict at defendant's request. Plaintiff rested her case at the conclusion of her evidence and again at the conclusion of her rebuttal and an affidavit purporting to set forth additional evidence should not be considered in connection with a motion for new trial, absent any showing that it meets the tests for newly discovered evidence, i.e., that plaintiff could not have discovered the evidence with due diligence at the time of the trial, and that the evidence is material and relevant to the issue. *Gray* v. *Missouri Lumber & Mining Co.*, 177 S. W. 595, 596 (Mo. Sup., 1915).

For all the foregoing reasons, we respectfully submit that plaintiff has failed to show that her husband's death was proximately caused by the alleged injury of February 12, 1947, or the alleged negligent acts of defendant on February 12, 1947, and on April 7, 1947, and that the trial court was therefore justified in refusing to submit this case to the jury.

D. Defendant is not liable for any alleged delay in securing medical assistance for the decedent, even if said delay caused or contributed to decedent's death.

Plaintiff (petitioner) urges that defendant (respondent) should be held liable for decedent's death because of an alleged delay in securing medical assistance for the decedent. Her argument is apparently set out in Point IV on page 19 of her supporting brief, but the authorities there cited, while setting forth a number of general principles applicable to cases under the Federal Employer's Liability Act, do not seem to be appropriate on this point.

As previously pointed out, there was no evidence that the alleged delay in securing treatment in any way con-

tributed to the death. However, even if it were shown that the death was caused or contributed to by any delay in treatment (which defendant denies), we submit that defendant should not be liable.

There was no evidence that anything could have been done for the deceased which was not done up until the time of the arrival of his train at Union Station, Kansas City, Missouri. At that point, the evidence was undisputed that both defendant's Passenger Agent and the attendant in the Union Station emergency hospital had called Dr. Heller immediately upon receipt of the message concerning decedent's condition, and the undisputed evidence further was that said message was received as promptly as possible. The evidence was that Dr. Heller was a physician engaged in the general practice, and there was no evidence that he was other than a competent physician. Therefore we have the situation that defendant brought the stricken employee to the nearest place shown to have facilities for treating him, and that at that place a competent physician was summoned at as early a time as possible. There is no evidence that Dr. Heller informed anyone that he could not or would not come to treat the deceased.

Plaintiff, in her brief, charges that defendant is guilty of negligence in not calling another doctor, because Dr. Heller was called before 7:00 o'clock A. M. and failed to meet the train. Actually, the evidence is that he was called not over five or ten minutes before the arrival of the train, and, of course, it would not be possible for him to meet the train within that short space of time. Plaintiff makes the point that there are many physicians and surgeons available within the immediate vicinity of the Kansas City Union Station, but seems to overlook the point that by the time it might have been realized that

Dr. Heller was not coming promptly, the stricken man was in the care of the attendant at the Union Station emergency hospital, which attendant was not an employee or agent of the defendant, and also by this time the plaintiff in this action, the wife of the stricken man, had arrived at the emergency hospital (R. 167). We submit that the presence of these two persons would completely relieve defendant of any duty which it might be claimed to have had to summon another doctor, even after it had already called a competent physician and had no notice that he was not coming with reasonable promptness. Surely, plaintiff and the emergency hospital attendant would have notice as soon as would defendant that there was a possibility that Dr. Heller would be delayed, and there was obviously nothing that would prevent either of them from summoning another physician.

Petitioner's own brief (page 19) stresses that the reason for the rule contended for by petitioner is that the employee is physically or mentally incapable of procuring assistance for himself, and argues that in such event, the employer should be held liable to procure and furnish to the employee all necessary aid and assistance. It seems obvious that the rule would not apply after the arrival of the injured man's wife, and that if there was any negligence in failing to call another physician, it was her responsibility. Furthermore, the evidence is that the dining car did not leave St. Joseph for nearly an hour after deceased became ill, and there is no evidence that when he first became sick he was so disabled as to be incapable of caring for himself. Plaintiff does not attempt to explain why at that point deceased did not leave the dining car and seek medical assistance or ask his fellow employees to help him off and find a doctor for him in St. Joseph, which could have been readily accomplished.

For all of the reasons set forth under Point I of defendant's brief, we respectfully submit that plaintiff failed to make a jury case and that the court below acted properly in sustaining defendant's motion for a directed verdict.

II.

The petition for writ of certiorari in this case should be dismissed because petitioner (A) has failed to exhaust her remedies in the state courts, and (B) has failed to comply with the rules of this Court with reference to the form of petitions for writs of certiorari.

A. The petition for writ of certiorari in this cause should be dismissed because petitioner has failed to exhaust her remedies in the state courts.

Respondent respectfully submits that petitioner has failed to exhaust her remedies in the state courts, and that therefore the petition for writ of certiorari in this cause should be dismissed. As previously pointed out, and as shown on page 27 of petitioner's Appendix B, the judgment of Division No. 2 of the Supreme Court of Missouri was entered on September 13, 1954. Petitioner filed motion for rehearing on September 27, 1954, which was overruled on October 11, 1954. (Appendix B, page 35; Tr. 425, 435.) On November 8, 1954, Division No. 2 of the Missouri Supreme Court denied leave to petitioner to file a motion in the said Division to transfer the cause to the Supreme Court of Missouri, *en banc,* and on November 16, 1954, the Supreme Court of Missouri, *en banc,* granted leave to file such motion and forthwith and peremptorily overruled said motion. As pointed out by this Court in *Gorman* v. *Washington University,* 316 U. S. 98, 62 S. Ct. 962 (1942), the Supreme Court of Missouri is authorized to sit either in divisions or *en banc,* and causes are ordinarily heard initially by a Division, after which, upon

proper motion, they may in certain instances be transferred to the Court, *en banc,* for further consideration. Constitution of Missouri, 1945, Article V, §§ 7 and 9 (quoted in Appendix). As therein pointed out, one of the grounds for transferring a cause to the Court, *en banc,* is the fact that a federal question is involved, and for this reason, as pointed out in *Gorman* v. *Washington University,* the judgment of a Division of the Supreme Court of Missouri is not that of the "highest court of a state in which a decision could be had" within the meaning of the United States Judicial Code. In the *Gorman* case, apparently no attempt was made to have the case transferred from the Division of the Missouri Supreme Court to the Supreme Court of Missouri, *en banc,* whereas in the present case, it is our contention that no *effective* attempt was made to request such a transfer, and for this reason, we respectfully contend that the petitioner did not exhaust all of the possibilities afforded by Missouri state procedure for the review of the state court judgment below by all state tribunals. The Missouri Supreme Court has full power to make rules of practice and procedure for all Missouri courts. Constitution of Missouri, Article V, § 5; R. S. Mo., 1949, § 477.010 (both quoted in Appendix). Pursuant to this authority, it has established rules for practice. (Pertinent rules hereinafter referred to are quoted in Appendix.) Rule 1.19 provides that in all Missouri appellate courts, motions for rehearing must be filed within 15 days after the opinion of the Court shall be filed, and after a cause has been once reheard and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the Court. Rule 2.02 provides that a motion to transfer a cause from either Division of the Missouri

Supreme Court to the Court, *en banc,* must be filed within 15 days after the delivery of the opinion in Division, and further that such motion to transfer may be joined with a motion for rehearing. Nowhere in the rules do we find any provision for an extension of time within which to file such motion or for authority in the Court to grant leave to file such motions out of time. It is clear from the record that the time within which petitioner could file her motion to transfer to the Court, *en banc,* under these rules had long since expired before she attempted to file such motion, and the attempt to file such motion on November 8, 1954, in Division No. 2, and on November 16, 1954, in the Court, *en banc,* was purely an afterthought in an attempt to make a colorable showing of having exhausted all remedies in the state court. Leave was denied to file the motion to transfer in Division, which is the place where such motions are regularly filed (see Rule 2.03, and letter from Clerk of Missouri Supreme Court, both set forth in Appendix to this brief), and while leave was granted to file the motion in the Court, *en banc,* the record shows that it was promptly overruled, indicating that the Court gave only formal consideration to the motion (Tr. 439). Rule 1.19 provides that a respondent may file suggestions in opposition to a motion for rehearing within ten days after the expiration of the time for filing of such motion, whereas in the present case, the Court, *en banc,* did not even notify counsel for respondent of the granting of leave to petitioner to file the motion for transfer, much less granting respondent an opportunity to oppose such motion.

For all the foregoing reasons, and for the reasons more fully set forth in *Gorman* v. *Washington University, supra,* respondent respectfully submits that petitioner has not properly exhausted all available remedies in the state

courts and that therefore her petition to this Court should be dismissed.

B. The petition herein should be dismissed because petitioner has not complied with the rules of this Court with reference to the form of her petition for writ of certiorari.

Respondent respectfully submits that the printed document filed in this cause by petitioner and intended to serve as a petition for writ of certiorari does not comply with Rule 23 of the Rules of this Court in many respects.

Among other points, respondent would show this Court that Sub-Rule 3 of said Rule 23 provides that all contentions in support of the petition shall be set forth in the body thereof and that no separate brief annexed or appended to a petition will be received. Respondent respectfully submits that petitioner, commencing on page 11 of her printed document which is labeled on the cover as a petition for a writ of certiorari, has set forth a document plainly labeled "Supporting Brief to the Petition for a Writ of Certiorari."

Respondent would further suggest to this Court that Sub-Rule 1 of said Rule 23 sets forth, in subparagraphs (a) through (j), inclusive, the contents to be included in the petition, in the order there indicated, whereas the printed document filed by petitioner herein completely disregards the order therein specified, and some of the information therein required can be found only by reference to the appendix to the petition, printed and bound separately from the petition. Respondent would further show this Court that nowhere in the petition for writ of certiorari is there set forth, as required in subparagraph (e) of Sub-Rule 1 of Rule 23, a concise statement of the case containing the facts material to the consideration of the questions presented.

For all of the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari filed in this cause should be dismissed.

Conclusion.

For all of the foregoing reasons, respondent respectfully submits that:

1. Petitioner did not adduce any evidence of negligence on the part of respondent or of any causal connection between the death of decedent and respondent's alleged negligence.

2. The trial court did not err in not permitting petitioner to submit to a lay jury a case based solely on speculation and involving questions which require expert testimony, in the absence of any testimony from any competent expert to substantiate petitioner's theory of recovery.

3. Petitioner has not properly perserved her rights to petition for a writ of certiorari in this Court.

Respondent therefore fully submits that the petition for writ of certiorari filed in this Court should be denied or dismissed.

Respectfully submitted,

H. M. Langworthy,
Clyde J. Linde,
Robert B. Langworthy,
Attorneys for Respondent.

January, 1955

APPENDIX.

The following are pertinent portions of the Rules of the Supreme Court of Missouri referred to in respondent's brief (as such Rules appear in Volume II, Missouri Revised Statutes, 1949, pages 4102 and 4105):

1.19—Motions for Rehearing. Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere re-argument of issues determined by the opinion will be disregarded.

If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time.

* * * * * * *

2.02—Transfer to the Court *en Banc*. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court *en banc* must be filed within fifteen days after the opinion of the court shall be deliv-

ered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court *en banc* may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative.

2.03—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *en banc* to a division for final determination upon the record, shall be presented to, heard and determined by the Court *en banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

* * * * * * *

The following are pertinent sections of Article V of the Constitution of the State of Missouri of 1945 referred to in respondent's brief (as such sections are reprinted in Volume I, Missouri Revised Statutes, 1949, pages 62 and 63):

Section 5. Rules of practice and procedure—duty of supreme court—power of legislature.—The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.

* * * * * * *

Section 7. Divisions of appellate courts.—The supreme court may sit *en banc* or in divisions, and courts of appeals may sit in divisions, as the courts may from time to time determine. Each division shall be composed of not

less than three judges, at least one of whom shall be a regular judge of the court.

• • • • • • •

Section 9. Transfer of causes to supreme court *en banc*.— A cause in the supreme court shall be transferred to the court *en banc* when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion therein, or a federal question is involved, or pursuant to supreme court rule.

• • • • • • •

The following is the text of Section 477.010, Revised Statutes of Missouri, 1949, referred to in respondent's brief (as such section appears in Volume II, Missouri Revised Statutes, 1949, page 3569):

477.010. Supreme court to promulgate general rules for all courts of the state.—The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being. (L. 1943, p. 353, §10)

• • • • • • •

On January 8, 1955, counsel for respondent addressed a letter to the Clerk of the Supreme Court of Missouri inquiring as to the usual procedure for the filing in such Court of motions to transfer causes from a Division of said Court to the Supreme Court of Missouri *en banc*, and particularly with reference to whether such motions to transfer are filed in the Division, or in the Court *en banc*.

The following is a true, correct and complete copy of a letter dated January 10, 1955, received on January 11, 1955, by counsel for respondent from the Clerk of the Supreme Court of Missouri:

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri

Marion Spicer
Clerk

Telephone
6-3715

January 10, 1955

Messrs. Langworthy, Matz & Linde
300 Union National Bank Bldg.
900 Walnut Street
Kansas City 6, Missouri

In re: Kane vs. Chicago, Burlington & Quincy Railroad Co., No. 43875

Gentlemen:

In reply to your letter of January 8, 1955, in regard to the filing of motions to transfer I wish to advise that such motions are filed in division, as provided by Rule 2.02.

Yours very truly,
MARION SPICER
Clerk